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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY DAT PHAM, Defendant and Appellant.	B233975 (Los Angeles County Super. Ct. No. GA081451)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed in part, conditionally reversed and remanded in part.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

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SUMMARY

Defendant Jimmy D. Pham was charged by information with one count of possession for sale of cocaine base (Health & Saf. Code, § 11351.5), in addition to gang enhancement allegations (Pen. Code, § 186.22, subd. (b)(1)(A)). Defendant filed a motion for pretrial discovery of evidence of misconduct by the arresting deputies, alleging that his oral and written confessions were coerced by police misconduct. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) The trial court denied the motion, finding that defendant failed to demonstrate good cause for the requested discovery.

The jury convicted defendant and found true the gang enhancement allegation. Defendant's Penal Code section 1118.1 motion, challenging the sufficiency of the evidence to support the gang allegation, was denied. He was sentenced to 3 years on count 1, 2 years for the gang enhancement, and was granted 580 days presentence custody credit, consisting of 290 actual days and 290 days of conduct credit.[1] He filed a timely notice of appeal.

On appeal, defendant contends (1) the trial court abused its discretion in denying his *Pitchess* motion because it was supported by good cause; and (2) insufficient evidence supports the gang enhancement because it was based entirely on defendant's own statements about selling narcotics for the benefit of a gang, and thus violated the corpus delicti rule. We agree that the trial court erred in denying defendant's *Pitchess* motion and therefore conditionally reverse and remand the case for the limited purpose of conducting an in camera review and to assess prejudice in the event that responsive documents are found. In all other respects, the trial court's judgment is affirmed.

FACTS

On the evening of September 2, 2010, Los Angeles County Deputy Sheriff Choong Lee was on patrol in San Gabriel as part of Operation Safe Streets (OSS), a task

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[1] Defendant initially received 435 days of custody credit, consisting of 290 actual days and 145 days of conduct credit. The trial court later granted defendant's postjudgment motion to correct his custody credits and issued a new abstract of judgment nunc pro tunc.

force that targets Asian street gangs. Deputy Lee entered Café Window, a local restaurant that is a known gang hangout, and approached defendant, who was not engaged in any criminal activity, to speak with him. Defendant told Deputy Lee that he was on probation and that his name was "Jimmy." Deputy Lee noticed that defendant had a tattoo of koi fish. Deputy Lee then asked defendant if he was in possession of anything illegal, and defendant replied that he was carrying rock cocaine in his pocket. Deputy Lee then detained and searched defendant, finding 21.9 grams of rock cocaine and $132 in cash in his pockets. Other members of the OSS task force, including Deputy Klinkalong, arrived at the scene.

In Deputy Lee's patrol car, defendant waived his *Miranda*[2] rights and agreed to talk with Deputy Lee. He told Deputy Lee that he had been out of work for two years and that he was selling rock cocaine he received "on credit" from his gang, the Vietnamese Boys, or V Boys. Defendant explained that after selling drugs he received on credit, he kept a portion of the proceeds and gave the rest to the V Boys, which would use the money for recruitment and to enhance the gang's stature. Defendant told Deputy Lee that he went by the moniker "Phat Jimmy," and that he had been a member of the V Boys since the ninth grade. Defendant also wrote and signed a statement which said: "I was sitting at the bar when Deputy Lee asked me if I was on probation. I said yes. I had rock cocaine in my pocket. The cocaine was mine. I haven't had a job for two years. I sell cocaine. The rock cocaine was less than an ounce."

Deputy Lee testified as a gang expert with experience dealing with Asian gangs. He opined that narcotics sales are the primary moneymaking activity of Asian gangs. These gangs use narcotics sales to recruit more members, intimidate other gangs, and purchase weapons and more drugs. Members receive drugs on credit from their gang to sell as a reward for contributing to the gang's activities. He also testified that it is common for Asian gang members to have tattoos of koi fish.

Deputy Lee testified that the V Boys is an Asian gang whose members are primarily Vietnamese. Before he spoke with defendant in Café Window, Deputy Lee had

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

seen a picture of defendant on a chart that investigators in the sheriff's office used to identify gang members. Defendant appeared on this chart as a member of the V Boys. During cross-examination, Deputy Lee admitted that before the incident he had no contact with defendant, and that defendant did not appear to be involved in criminal activity when he approached him. He further stated that defendant did not write any statements about being a gang member, and that "general people in the population" who are not gang members have tattoos of koi fish.

Deputy Lee also testified about possession of drugs for "purposes of sale" and to benefit a gang. When posed with a hypothetical based on the facts of this case, Deputy Lee opined that drug possession benefits the gang by boosting its reputation, getting money for it, and facilitating recruitment. He further testified that a person in possession of 21 grams of cocaine and $132 in cash and not under the influence of the drug "possessed the narcotics for possession of sales because the denomination itself is consistent with street level sales, $20 pieces, five dollar hits" and the quantity of drugs far exceeds the usable amount. Tom Yu, an expert on narcotics sales who was also assigned to OSS, similarly concluded under the same hypothetical, the possession was for purposes of sale based on the quantity of drugs.

DISCUSSION

Summarizing again the points raised on appeal, defendant contends: (1) the trial court abused its discretion by summarily denying defendant's *Pitchess* motion without conducting an in camera review of the requested records; and (2) the true finding on the gang enhancement must be reversed because it was not buttressed by independent evidence but rested entirely on defendant's admissions in violation of the corpus delicti rule. We agree with defendant's first argument, but find no merit in the second.

1. Trial Court's Denial of Defendant's *Pitchess* Motion

Peace officer personnel records and records concerning citizen complaints made against peace officers are confidential, and are subject to discovery only under limited circumstances. (Pen. Code, § 832.7.) The procedure for requesting discovery of confidential peace officer personnel records and citizens' complaints is governed by

Evidence Code sections 1043 through 1047. A defendant requesting the confidential information must make a good cause showing by affidavit setting forth the materiality of the requested information to the pending litigation, and must assert a reasonable belief that the government agency identified in the motion has the type of information sought. (Evid. Code, § 1043, subd. (b)(3).) The party seeking the information must also provide a description of the type of information sought, and notice must be provided to the agency having custody of the records. (*Id*., § 1043, subds. (a), (b)(2), (3).)

A showing of good cause is measured by relatively relaxed standards that serve to insure the production of all potentially relevant documents for trial court review. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) It requires only that the defendant establish a "logical link between the defense proposed and the pending charge," and articulate with some specificity "how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021 (*Warrick*).)

The specificity requirement "enables the trial court to identify what types of officer misconduct information, among those requested, will support the defense or defenses proposed to the pending charges." (*Warrick*, *supra*, 35 Cal.4th at p. 1021.) It insures that the defendant's request does not compel discovery of " ' "all information which has been obtained by the People in their investigation of the crime" ' " but rather only instances of officer misconduct that are related to the types of misconduct alleged by the defendant. (*Ibid.*, citations omitted.)

To make the minimal showing, "the defendant must propose a potential defense to the pending charge, articulate how the discovery might lead to or constitute evidence providing impeachment or supporting the defense, and describe an internally consistent factual scenario of claimed officer misconduct. . . . [T]he scenario may be a simple denial of accusations in the police report or an alternative version of what might have occurred." (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72 (*Garcia*).)

If a defendant shows good cause, the court must conduct an in camera hearing to determine what information sought, if any, must be disclosed. (*People v. Gaines* (2009)

46 Cal.4th 172, 179 (*Gaines*).) A criminal defendant is entitled to discovery of all relevant documents or information in the confidential records of the peace officers accused of misconduct against the defendant, provided it does not concern officer conduct occurring more than five years before the incident, the results of internal police investigations, or facts with no practical benefit to the defense. (*Id.* at pp. 179, 182; see also Evid. Code, § 1045, subd. (b).) This encompasses not only evidence that would be admissible at trial, but also evidence that may lead to admissible evidence or evidence that is pertinent to the defense. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048-1049; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) The defendant is not required to present a "*credible* or *believable* factual account of, or a motive for, police misconduct," but may succeed on a *Pitchess* motion by alleging a scenario of officer misconduct that "might or could have occurred." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.)

We review the denial of a motion for discovery of peace officer personnel records for abuse of discretion. (*People v. Breaux* (1991) 1 Cal.4th 281, 312.)

Defendant's motion sought five broad categories of information. Category 1 sought many different types of complaints against Deputies Lee and Klinkalong, including complaints of "aggressive behavior, violence, excessive force, or attempted violence or excessive [force], racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 [(*Wheeler*)]." Category 2 sought discovery of any disciplinary actions taken pursuant to those complaints. Category 3 sought "[a]ny other material which is exculpatory or impeaching within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83." Category 4 sought information and evidence related to Civil Service Commission (CSC) hearings in which either deputy was accused of any of the

types of misconduct listed above. And category 5 sought "[t]he statements of all police officers who are listed as either complainants or witnesses within the meaning of [categories] 1 and 3."

As we will discuss below, as to category 1, we conclude that defense counsel has demonstrated good cause for discovery of complaints of acts of coercive conduct and dishonesty (including fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search and/or seizure, false arrest, perjury, dishonesty, writing of false police reports, and planting of evidence). But defendant failed to demonstrate good cause as to complaints of acts of excessive force (including acts of aggression, violence, excessive force, or attempted violence or excessive force), writing of false police reports to cover up the use of excessive force, violation of constitutional rights, bias, evidence of other conduct constituting moral turpitude, and writing of "misleading internal reports including but not limited to false overtime or medical reports." Defendant also demonstrated good cause for the items listed in categories 2 and 3, with category 2 being limited to the same extent as category 1. As to categories 4 and 5, the information sought is not discoverable.

In addition, we conclude that defendant's good cause showing applies only to Deputy Lee, and not to Deputy Klinkalong. On appeal, defendant showed no reason to believe that the trial would have ended in a different outcome if information related to Deputy Klinkalong had been disclosed. (See, e.g., *Gaines, supra*, 46 Cal.4th at p. 182 [noting that "a defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed"].) Nothing in defendant's motion showed any misconduct by Deputy Klinkalong, who neither interrogated defendant nor wrote the incident report. (See *People v. Memro* (1985) 38 Cal.3d 658, 686 (*Memro*).)

Respondent cites *Warrick, supra*, 35 Cal.4th 1011, for the proposition that defendant's allegations of officer misconduct are not sufficiently specific, and that the declaration therefore does not satisfy the requirements of Evidence Code section 1043. The defendant in *Warrick* was charged with possession of cocaine for sale. (*Warrick*, at

pp. 1016-1017.) Claiming that he was falsely arrested and that the arresting officers fabricated facts in their arrest report, he filed a *Pitchess* motion to compel discovery of dishonesty complaints and "a long list of other misconduct" by the arresting officers. (*Warrick*, at p. 1017.) In the declaration, defense counsel denied that the defendant had possessed cocaine for sale and asserted two alternative explanations for what happened. (*Id*. at pp. 1022-1023.) The opposition argued that the declaration supporting the allegations consisted of a simple denial of guilt and that the defendant "had not affirmatively set out any facts to describe a specific factual scenario." (*Id.* at p. 1022.) The court concluded that the defendant's factual foundation was both specific and plausible because, "[b]y denying the factual assertions made in the police report – that he possessed and discarded the cocaine – defendant established a 'reasonable inference that the [reporting] officer may not have been truthful.'" (*Id.* at p. 1023, citation omitted.)

Here, the allegations in defense counsel's declaration are sufficiently specific. The declaration averred that all of the statements attributed to defendant, from the point of initial contact with the deputies to his questioning at the station, were elicited through coercion. The declaration describes specific acts of coercion: "Based on information and belief Mr. PHAM was grabbed from behind by the officers, while being simultaneously searched." The declaration also describes an alternative factual scenario to the one alleged in the incident report, asserting defendant "did not willing [*sic*] make any of the statements attributed to him" and that the deputies attempted to conceal the illegality of their actions in "unwarrantedly detaining and questioning" defendant in two separate ways: by making false statements in their reports and by using the "contraband allegedly recovered . . . to bolster their false version of events and to give them more justification for their inappropriate actions."

We cannot say that defendant's version of events is implausible. Counsel declared that defendant's oral and written statements were involuntary and were coerced by Deputy Lee's use of physical force and that Deputy Lee attempted to cover up this improper conduct by falsely claiming the statements were voluntary. It is possible that this "might or could have" happened, which is all that is required under *Pitchess*.

(*Warrick, supra*, 35 Cal.4th at p. 1026.) This scenario is also "internally consistent," since it differs from the incident report only insofar as it denies that defendant voluntarily made the statements attributed to him in the report. (*Ibid.*) An internally consistent factual scenario "may be a simple denial of accusations in the police report or an alternative version of what might have occurred." (*Garcia*, *supra*, 42 Cal.4th at p. 72.)

It was undisputed that defendant did not appear to be engaged in any illegal activity when Deputy Lee approached him in the café. Deputy Lee recognized him from a chart of photos of members of the V Boys gang. Defendant was sitting in a café where gang members were known to hang out and had a koi fish tattoo, but Deputy Lee did not testify that his suspicions were aroused by the encounter with defendant in a café with a koi fish tattoo. Deputy Lee contacted defendant because he "just wanted to know how he was doing. If he was still in the gang, what he's been up to." While admitting in the declaration that "[t]he officers recovered some objects of possible contraband once Mr. PHAM was detained, questioned and searched," defendant denied that he voluntarily told Deputy Lee that he had rock cocaine in his pocket or that he possessed it for sale and had engaged in drug sales for his gang for two years. Defendant "establish[ed] a plausible factual foundation" for a defense to the charge of possession for sale of cocaine base on the premise that his statements were elicited involuntarily by coercive police tactics. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 417.)

A defense formed around this factual foundation provides good cause for inquiring into past complaints that Deputy Lee engaged in coercive conduct, planting of evidence, and the various kinds of dishonesty described in the first category of the motion (with the exception of writing of false police reports to cover up the use of excessive force).

Defendant, however, failed to show good cause for discovery of the other types of complaints listed in the first category of discovery. In particular, he failed to show that complaints relating to excessive force are relevant. Defendant's relies on *Memro, supra*, 38 Cal.3d at page 681, for the proposition that "evidence that the interrogating officers had a custom or habit of obtaining confessions by violence, force, threat or unlawful aggressive behavior would have been admissible on the issue of whether the confession

had been coerced." We do not read *Memro* to support disclosure of all excessive force complaints when a defendant claims a confession was extracted by force. And, in any event, the reasoning in *People v. Jackson* (1996) 13 Cal.4th 1164 (*Jackson*) is more persuasive and on point. *Jackson* held that "when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officers is overly broad." (*Jackson*, at p. 1220.) While defendant's brief states that he was "essentially forced to make incriminating statements," he does not assert that the deputies used excessive force.

The declaration also failed to establish good cause for discovery of Deputy Lee's conduct constituting moral turpitude. Even though the declaration called into question Deputy Lee's truthfulness, the blanket request for "any other evidence of misconduct amounting to moral turpitude within the meaning of [*Wheeler*, *supra*,] 4 Cal.4th 284" was overbroad. Although *Wheeler* generally holds that nonfelony conduct involving moral turpitude is admissible to impeach a criminal witness, *Wheeler* did not consider such discovery in the context of the confidentiality afforded to peace officer personnel records. (*Wheeler*, at p. 295.) Cases that have considered the intersection of *Wheeler* and *Pitchess* have concluded that *Wheeler* does not abrogate the good cause requirement of the Evidence Code, and that "only documentation of past officer misconduct which is similar to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1024 [seeking all *Wheeler* evidence "would effectively abrogate the good cause requirement . . . by permitting fishing expeditions into the arresting officers' personnel records in virtually every criminal case"].)

There is even less support for discovery of complaints relating to the various types of bias mentioned in defendant's motion, violations of constitutional rights, and writing of "misleading internal reports including but not limited to false overtime or medical reports." Such items are "completely untethered either to the factual scenario or to the proposed defenses outlined in defense counsel's declaration." (*Warrick*, *supra*, 35 Cal.4th at p. 1022.)

To the extent that category 2 seeks discovery of any disciplinary actions taken against Deputy Lee for the complaints against him, this information is discoverable for the same categories of complaints for which discovery is authorized under category 1, *ante*.

As for category 3, we agree with defendant that he is entitled to any evidence that would exculpate him or reduce his penalty under the United States Supreme Court's ruling in *Brady v. Maryland*, *supra*, 373 U.S. 83. (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 15 ["a trial court that in response to a criminal defendant's discovery motion undertakes an in-chambers review of confidential documents can, if the documents contain information whose use at trial could be dispositive on either guilt or punishment, order their disclosure"].)

As for categories 4 and 5, we conclude that information and evidence connected to CSC hearings, including the transcripts, in which Deputy Lee was accused of misconduct, as well as statements by any peace officers investigating the complaints against Deputy Lee, are not discoverable. (Evid. Code, § 1045, subd. (b)(2) [in determining relevance in a criminal proceeding, the trial court "shall exclude from disclosure" "the conclusions of any officer investigating a complaint"].) Typically, "only the names, addresses and telephone numbers of individuals who have witnessed, or have previously filed complaints about, similar misconduct by the officer" are subject to disclosure. (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) Defendant's reliance on *Britt v. North Carolina* (1971) 404 U.S. 226, 227 is misplaced. That case held that a defendant being retried for murder was entitled to transcripts of the prior proceedings so that he would be able to mount "an effective defense or appeal," and did not concern *Pitchess* discovery.

The trial court was required to conduct an in camera hearing to determine the presence of any discoverable material in Deputy Lee's personnel files. (*People v. Gill* (1997) 60 Cal.App.4th 743, 750.) Because it failed to do this, it abused its discretion. "To obtain relief, . . . a defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome

had the evidence been disclosed." (*Gaines, supra,* 46 Cal.4th at p. 182.) In other words, he must establish that "prejudice resulted from the trial court's error in denying discovery." (*Memro, supra,* 38 Cal.3d at p. 684.) Since we do not know whether complaints of the sort listed in defendant's motion have been made against the deputy in this case, we cannot say whether it is reasonably probable that discovery would have led to a different outcome. (*Gill,* at pp. 750-751.) Consequently, we conditionally reverse the judgment and remand the case to the trial court, which is to conduct an in camera review of the records in Deputy Lee's personnel files that are discoverable in conformance with this opinion. (*Gaines,* at p. 180.) Should the trial court find that these records contain no relevant information, the judgment is to be reinstated. (*Id.* at p. 181.) Conversely, if the trial court determines that the records do contain relevant information, it " 'must order disclosure, allow [defendant] an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.' " (*Ibid.*)

2. True Finding on the Gang Enhancement

Defendant also contends that the prosecution did not present sufficient evidence of the gang enhancement independent of the defendant's confession, and that this violated the corpus delicti rule. We disagree.

The corpus delicti rule "'essentially precludes *conviction* based solely on a defendant's out-of-court statements.'" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1178, quoting *People v. Ray* (1996) 13 Cal.4th 313, 341.) "The term 'corpus delicti' refers to 'the body of a crime' . . . or generally speaking, the 'elements of the crime.'" (*People v. Shoemake* (1993) 16 Cal.App.4th 243, 255 (*Shoemake*), citations omitted.) It "does not include the identity of the perpetrator, the degree of the crime, or the enhancement of the penalty for the offense." (*People v. Miranda* (2008) 161 Cal.App.4th 98, 101.) Therefore, the corpus delicti rule, requiring independent evidence to support a conviction, has been held to not apply to enhancements. (*Shoemake, supra,* at p. 255; *People v. Miranda, supra,* at p. 101.) Defendant argues that the gang enhancement allegation in this case should be considered as part of the underlying crime, and asks us to reject

Shoemake and *People v. Miranda* as wrongly decided. We disagree, and find *Shoemake* and *People v. Miranda* controlling.

In *Shoemake*, the court concluded that the corpus delicti rule does not apply to an enhancement allegation under Penal Code section 12022.85 for committing certain sexual offenses while knowingly infected with AIDS, reasoning that enhancements are not crimes, but "merely impose[] additional punishment for a crime when certain circumstances are found to exist." (*Shoemake, supra,* 16 Cal.App.4th at p. 255.) *People v. Miranda*, *supra*, 161 Cal.App.4th at page 101 held similarly, that the rule does not apply to the transportation element of the crime of transporting a controlled substance for sale. Both cases stand for the proposition that the corpus delicti rule does not apply to enhancements simply because they subject a defendant to a lengthier sentence.

Even if the corpus delicti rule did apply to gang enhancements, the rule would not have been violated in this case. The independent proof of the corpus delicti "may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible." (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1171.) Here, Deputy Lee testified that defendant was a member of the V Boys and that the café where he was found was frequented by members of that gang. He further opined that the amount of cocaine possessed by defendant suggested that he was holding it for purposes of sale for the benefit of the V Boys. This was sufficient independent evidence of a gang affiliation to corroborate defendant's confession.

DISPOSITION

The judgment is affirmed in part, and conditionally reversed and remanded in part.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.